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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JASON DAVID GUTIERREZ et al., Defendants and Appellants.	E053170 (Super.Ct.No. RIF145050) **OPINION**

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part and reversed in part with directions.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant Jason David Gutierrez.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant Isaac Rene Manzano.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Steven T. Oetting and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

On March 16, 2007, fellow Escondido Diablo gang members defendant Jason David Gutierrez and defendant Isaac Rene Manzano went to a Jack in the Box Restaurant in Temecula. When they arrived, numerous people were in the parking lot of the restaurant, including the three victims in this case, Rashad Gordon, Jacques Aultman, Jr., and Daniel Montanez. Manzano told Gutierrez that Gordon had beat him up on a prior occasion. Gutierrez armed himself with a gun. Manzano drove his car up to Gordon and let Gutierrez out of the car. Gutierrez shot at Gordon, shot Montanez twice, and sprayed bullets into the crowd, also hitting Aultman. Gutierrez then got back in the car and they drove away.

Defendants were tried together but by separate juries. They were both convicted of three counts of attempted willful, deliberate, and premeditated murder, with special gang and weapons use allegations found true by the jury. Defendants now contend jointly and individually as follows:

1. Manzano, presumably joined by Gutierrez, contends that the trial court erred by failing to instruct the jury on attempted voluntary manslaughter under a theory of heat of passion and imperfect self-defense.[1]

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[1] Defendants join in each other's claims.

2. Manzano contends that the trial court erroneously instructed the jury on aiding and abetting under the natural and probable consequences theory.

3. Manzano contends that the evidence was insufficient to support his conviction of the attempted premeditated, deliberate, and willful murder of Aultman and Montanez.

4. Gutierrez contends that the evidence was insufficient to support his conviction of attempted murder of victim Aultman because he did not possess the intent to kill him or everyone in the parking lot under a kill zone theory of concurrent intent to kill.[2]

5. Manzano contends that the sentencing enhancements imposed pursuant to Penal Code section 12022.53, subdivision (e)(1)[3] must be reversed as the jury did not make adequate findings on the enhancements.

We find no error as to any of the above claims and therefore affirm the judgments. We agree with Manzano, however, that the jury did not make adequate findings on the section 12022.53, subdivision (e)(1) enhancements. We will strike his sentence on those enhancements and remand his case for resentencing.

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[2] This issue does not pertain to Manzano because his jury was not instructed on a kill zone theory.

[3] All further statutory references are to the Penal Code unless otherwise indicated.

I

PROCEDURAL BACKGROUND

The trial court granted defendants' request that they be tried together but in front of two juries. Gutierrez was found guilty by his jury of the attempted premeditated, deliberate, and willful murders of Gordon, Montanez, and Aultman (§§ 664/187). The jury found true the allegation that the three attempted first degree murders were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). The jury also found true the allegations that Gutierrez personally and intentionally discharged a firearm (§ 12022.53, subd. (c)) in the counts involving Gordon and Aultman. The jury found true as to the count involving Montanez that Gutierrez personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)).

Manzano was found guilty by his jury of the attempted premeditated, deliberate, and willful murders of Gordon, Montanez, and Aultman (§§ 664/187). The jury found true the allegation that the three attempted first degree murders were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). The jury also found true allegations pursuant to section 12022.53, subd. (e)(1) on all three counts.

On January 21, 2011, Gutierrez was sentenced to state prison for the indeterminate term of 55 years to life, plus the determinate term of 20 years. On June 17, 2011, Manzano was sentenced to seven years to life for the attempted first degree murder of

Gordon. In addition, he received a determinate sentence of 20 years for the enhancement on that count pursuant to 12022.53, subdivision (e)(1).

II

FACTUAL BACKGROUND

A. *Testimony in Front of Both Juries*

1. *The shooting*

On March 16, 2007, the defendants were with Anthony Alferez[4] in Temecula. Gutierrez was known as "Sparks" from the Escondido Diablos (Diablos) gang. Alferez was nicknamed "Cricket" and was a member of the Inland Empire gang. Manzano's nickname was "Bird."

At some point, defendants and Alferez went to a gas station to buy cigarettes. On the way, someone got hungry, and they decided to go to the Jack in the Box restaurant located near Highway 79 in Temecula.

Rashad Gordon, Jacques Aultman, Jr.,[5] and Daniel Montanez were in the Jack in the Box parking lot with several friends; about 10 to 20 people were in the crowd. The victims' friends included Henry Bradley, Jr., Jason Duncan, and Jayde Watson. Gordon denied being a member of the Insane Crips gang but said that his cousins were members. Aultman denied being a member of a gang.

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[4] Alferez was granted immunity to testify.

[5] Aultman invoked his Fifth Amendment right not to testify, and his testimony from the preliminary hearing was read into the record.

Defendants and Alferez drove by the group. Gordon approached the car and yelled out to Alferez. Gordon and Alferez were friends. Alferez got out of the car and spoke to Gordon. Manzano had been involved in at least one fight with Gordon about six months prior to that night. Gordon had won the fight.

Gutierrez also got out of the car and approached Gordon. Gutierrez said, "Sparks, Diablos." Gutierrez asked Gordon where he was from and if there was a problem. Gordon responded that everything was fine. Alferez assured Gutierrez that there was no problem.

Gutierrez went back to the car but kept looking back at Gordon. Alferez remained with Gordon and also talked to Aultman and Montanez. Alferez stayed for a time and then got back in the car with defendants while they were in the drive-through getting food. Alferez got in the back seat.

When Alferez was back in the car, he heard Manzano tell Gutierrez that Gordon had jumped him. Alferez heard clicking sounds that he believed were Gutierrez loading a gun. He then indicated that "they" said, "They jumped me. We're going to bust a jale. We're going to do a jale right now."[6] Alferez never heard Manzano tell Gutierrez to shoot Gordon. However, Manzano was "hyped up" while they were talking.

Defendants and Alferez pulled out of the drive-through. Manzano pulled up next to Gordon. Gutierrez got out of the car and approached Gordon. Gutierrez said, "What's up?" to Gordon. Gordon responded by putting his palms up and saying, "What's up."

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[6] "Jale" is the Spanish word for work, which in this instance meant doing an act of violence for the gang.

Duncan, Watson, Bradley, Montanez, and Aultman were all standing together. Gordon took off his sweater, preparing for what he thought was going to be a fist fight. Aultman observed Manzano give Gordon an "angry expression" when he drove up.

Gutierrez pulled out a gun, said "Escondido Diablos," and started shooting. The time between Gutierrez exiting the car and the time of the shooting was less than one minute.

Some of the persons present heard Gutierrez fire two to three shots. Aultman heard four to five shots. Gutierrez was shooting toward everyone in the crowd. Everyone standing near Gordon scattered. Gordon and other people ran to another fast food restaurant. Aultman was running behind Gordon and was shot.

Montanez was shot in both legs. One of the shots broke his right femur. At some point, he fell to the ground.[7] While he was on the ground, Gutierrez walked toward him and shot at him again.[8]

Gutierrez got back in Manzano's car, and they drove to Escondido. Gutierrez said in the car, "We got them." Manzano responded, "Yeah, we got 'em. Yeah." Alferez just

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[7] Montanez's statement to police made prior to the trial was played for the jury.

[8] There is a conflict in the testimony as to when the second bullet hit Montanez. Jayde Watson testified that Montanez fell after the first bullet hit his left leg, and Gutierrez then shot him in the right leg as he lay on the ground. Montanez testified that he was shot in the left leg followed almost immediately by a second shot in the right leg, after which he fell to the ground. While he was on the ground, Gutierrez shot at him twice more.

went along and laughed. Defendants talked about the shooting once they arrived in Escondido. They said they had shot a couple of people.

Manzano dropped Alferez and Gutierrez off at a party in Escondido. Gutierrez told Alferez at the party not to say anything about the shooting. Several days later, Manzano was looking at an article about the shooting on the computer. He also told Alferez not to say anything about the shooting.

2. *Investigation*

Montanez thought the gun had a silencer on it because it "was long," and it made a strange sound. Duncan and Watson drove Montanez to the hospital. Montanez had gunshot wounds to both of his thighs and required surgery. A bullet and piece of surgical metal used to fuse his femur was still in his leg. Montanez still had pain in his leg several years after the shooting.

Aultman was struck in his upper thigh. He had to get eight staples to close the wound.

Duncan was detained after the shooting, and a pellet gun that resembled a nine-millimeter pistol was found in his trunk. One of the officers noted that the pellet gun looked like a real gun. Duncan claimed he did not know where the gun came from or who it belonged to. Gordon did not know about the gun in Duncan's car. Duncan denied that any of his friends pulled out a gun first. Alferez denied that anyone other than Gutierrez displayed a gun that night.

Duncan was interviewed by police after the incident. He said the shooter used a nine-millimeter gun and that he heard at least 12 shots. Bullets hit his car. Watson also

testified that the shooter used a nine-millimeter or .45-caliber Glock. She testified that she heard at least three gunshots and that she saw the shooter deliberately shoot at Montanez while he was lying on the ground. Bradley's car was hit by bullets. A bullet was recovered from his car. Bradley thought the shooter used a pistol or revolver. Alferez thought the gun used by Gutierrez was a revolver. Another witness thought that the shooter used a revolver.

A mark was found on the drive-through menu at the Jack in the Box that could have been made by a gun. Trim on a nearby fast food restaurant had been chipped and could have been caused by a bullet.

Prior to trial, Gordon identified Gutierrez as one of two possible suspects in a six-pack photographic lineup. At trial, Gordon did not identify the shooter and claimed he was pressured to identify someone at an earlier proceeding. Gordon identified Manzano as the driver and not the shooter. Aultman identified Gutierrez as the shooter.

Prior to trial, Montanez said he knew two of the men in the car where the shooter came from because they had been in previous altercations with him and Gordon. Montanez proclaimed that he and Gordon had won the fight. At trial, Montanez denied he knew them and could not identify Gutierrez.

Gordon's statement to police made prior to trial was played for the jury. Gordon indicated that a group of "Mexican dudes" came up to him at the Jack in the Box and were "eyeballin'" him. One of the men got out of the car and pulled a gun. Gordon ran and heard shots. He heard Aultman say he had been shot. Montanez was bleeding, and Gordon helped him to Duncan's car. Gordon estimated there were eight shots. The

shooter was wearing gloves. Gordon admitted that Cricket was in the car with the shooter. Gordon thought the men in the car might be the same men he had had an altercation with previously.

3. *Gang evidence*[9]

Escondido Police Detective Jeffrey Valdivia was a gang expert and testified in front of both juries. In front of Gutierrez's jury, he testified that by committing violence, the person gained respect in the gang by causing fear in the community. The more fear caused by the gang in the community, the better off the gang was because no one would come in their territory or testify against gang members. Putting in work for the gang was committing violent crimes. Detective Valdivia opined that the shootings in this matter were committed for the benefit of and in association with the Diablos gang, and the crime would further promote the gang. Detective Valdivia indicated that if the person who was shot had beat up a fellow gang member, the shooter would want to retaliate for his fellow gang member. Further, the gang could not be seen as weak and losing a fight.

Gutierrez was an active Diablos gang member. However, Detective Valdivia had had no contact with Gutierrez before this incident, and he was not a known documented member before the shooting.

Detective Valdivia also testified in front of Manzano's jury that respect in a gang was obtained by violence and causing fear in the community. All challenges and insults to the gang must be dealt with. If a member of the Insane Crips gang, which was a Black

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[9] The parties do not contest the validity of the gang enhancement so we only briefly review the testimony of the gang expert.

Crips gang, beat up a Diablos gang member, it would be expected that the Diablos gang members would retaliate. He also opined to Manzano's jury that the instant crimes were committed to benefit the gang. Detective Valdivia had no contact with Manzano before this incident, and he was not a known documented member before the shooting.

B. *Testimony in Front of Manzano's Jury Only*

Manzano's statement made to police was played for the jury. Manzano admitted that he was at the scene that night but denied he was the shooter. He refused to identify Gutierrez as the shooter but rather identified the shooter as the person who was sitting next to him. He did not want to be a "snitch." He would be targeted by his own gang if he identified Gutierrez.

Manzano claimed the shooting was not planned. Alferez had nothing to do with it. Manzano said one of the men at the Jack in the Box had twice "jumped" him and had once robbed him. He described that person as a "Black kid named Rashad." "Rashad," who was obviously Gordon, and another person had "beat the shit" out of him, and he was angry at them. Gordon was a member of the Insane Crips gang. Manzano "bang[ed]" Diablos.

Manzano told Gutierrez that Gordon was the "fool" who had jumped him. Manzano wanted to fight Gordan but did not want to fight that night because Gordon was with too many people. Gutierrez put on gloves while they went through the drive-through lane.

After exiting the drive-through, Gutierrez instructed Manzano to stop the car, and Gutierrez got out. Manzano thought that Gutierrez was just going to get out of the car

and get in a fight with Gordon. Manzano then saw the gun that Gutierrez possessed and told Gutierrez to get back in the car. He was not okay with Gutierrez shooting Gordon. Manzano admitted he knew that Gutierrez had a gun that night but did not think that it was going to be used. Gutierrez just started shooting.

Manzano first indicated that he did not know why Gutierrez would shoot Gordon when Manzano was the one who had been jumped. Manzano then said, "Well, I know him very well too you know. He probably didn't like that . . . they jumped me."

Manzano indicated that Gutierrez was "probably" a member of Diablos. Manzano admitted he was a "soldier" or midlevel member of the gang.

Defendants did not present any evidence.

III

ATTEMPTED VOLUNTARY MANSLAUGHTER INSTRUCTION

Manzano contends that the trial court erred by failing to instruct the jury on attempted voluntary manslaughter under a theory of heat of passion or imperfect self-defense manslaughter, as it applied to Gutierrez as the shooter and under which his own liability was as an aider and abettor. Gutierrez presumably joins in the claim, as his jury was not instructed on attempted voluntary manslaughter.

A. *Additional Factual Background*

Gutierrez stated during discussion of the instructions (with all parties present) that instruction on attempted voluntary manslaughter on theories of imperfect self-defense and heat of passion was proper. Gutierrez argued that if someone in the crowd pulled a gun on him, then he was afraid and could shoot all of the victims. The trial court did not

believe that heat of passion was appropriate in the case. It was waiting for Gutierrez's testimony as to whether there was a gun in the crowd before deciding on the imperfect self defense instruction.

Once it was clear that Gutierrez was not going to testify, the trial court advised the parties it would not give the attempted voluntary manslaughter instruction. Gutierrez argued the fact there was an unknown gun in Duncan's car was enough to warrant the instruction on imperfect self-defense. The trial court then stated it would give the instruction if Alferez testified there was a gun in the crowd (which he did not). It did not believe that a pellet gun in Duncan's car was enough to give the self-defense instruction.

B. *Analysis*

"In criminal cases, even absent a request, a trial court must instruct on the general principles of law relevant to the issues the evidence raises. [Citation.] '"That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]"' [Citation.] '[T]he existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.]' [Citation.]" (*People v. Taylor* (2010) 48 Cal.4th 574, 623.)[10]

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[10] Manzano claims he is entitled to instruction on attempted voluntary manslaughter on a theory that Gutierrez acted in imperfect self-defense or in a heat of

[footnote continued on next page]

Gutierrez and Manzano were both charged with attempted murder of Gordon, Montanez, and Aultman. A conviction for attempted murder "requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623.) "Intent to unlawfully kill and express malice are, in essence, 'one and the same.' [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739.) Express malice is "'a deliberate intention unlawfully to take away the life of a fellow creature. [Citation.]'" (*People v. Lasko* (2000) 23 Cal.4th 101, 107.) "Voluntary manslaughter is a lesser included offense of murder. [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 181.) Attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 11.) Here, defendants contend that both heat of passion/sudden quarrel and imperfect self-defense voluntary manslaughter should have been given to the jury.

"Voluntary manslaughter is 'the unlawful killing of a human being, without malice' 'upon a sudden quarrel or heat of passion.' [Citation.] An unlawful killing is voluntary manslaughter only 'if the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an "'ordinary [person] of

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[footnote continued from previous page]
passion. Manzano relies upon *People v. McCoy* (2001) 25 Cal.4th 1111 for the proposition that when an aider and abettor is prosecuted under the natural and probable consequences theory of liability, he cannot be prosecuted for a greater offense than the actual perpetrator. In *McCoy*, the court found that an aider and abettor can be guilty of a greater offense than the perpetrator but specifically stated it did not apply to aiding and abetting under a natural and probable consequences theory. (*Id*. at pp. 1117-1120.) The People do not address the issue. We need not decide the issue because, as we find, the instructions were not supported by the evidence for either Gutierrez or Manzano.

average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'" [Citations.]' [Citation.] 'The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment. Adequate provocation . . . must be affirmatively demonstrated.' [Citation.]" (*People v. Thomas* (2012) 53 Cal.4th 771, 813.)

"'"The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim." [Citation.]'" (*People v. Verdugo* (2010) 50 Cal.4th 263, 294.)

Here, there simply was no reasonable evidence that supported an attempted voluntary manslaughter instruction on the theory of heat of passion. In fact, Manzano and Gutierrez do not even argue any facts to support the theory. Although Gordon had beat up Manzano in the past, there was no evidence that Gordon in anyway started a confrontation with Manzano or Gutierrez that night. When they arrived at the Jack in the Box, Gordon immediately called out to Alferez. Gutierrez confronted Gordon while he was talking to Alferez, but Gordon assured him that there was no problem.

Later, when Gutierrez approached Gordon after getting out of Manzano's car, he asked Gordon what was up. Gordon put his hands in the air and asked what was up. Gutierrez then yelled "Diablos" and started shooting. There is nothing in the evidence to support that Gordon made any move toward Gutierrez or said anything that would have been so inflammatory as to provoke Gutierrez. There was insufficient evidence of legally

adequate provocation to require an instruction on attempted voluntary manslaughter under a theory of heat of passion.

Additionally, there was no evidence that Gutierrez was acting in imperfect self-defense. "A person who *intentionally* kills in unreasonable self-defense lacks malice and is guilty only of voluntary manslaughter, not murder. [Citations.]" (*People v. Blakeley* (2000) 23 Cal.4th 82, 88.) In other words, "[o]ne who kills in imperfect self-defense -- in the actual but unreasonable belief he must defend himself from imminent death or great bodily injury -- is guilty of manslaughter, not murder, because he lacks the malice required for murder. [Citations.]" (*People v. Randle* (2005) 35 Cal.4th 987, 996-997, italics omitted, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.)

Manzano points to evidence that a pellet gun resembling a nine-millimeter pistol was found in Duncan's trunk and that some of the witnesses described the gun they saw that night as a nine-millimeter pistol. This is wildly speculative evidence not warranting the instruction. All of the witnesses testified that the only gun they saw that night was in Gutierrez's hands. Although there was differing eyewitness testimony as to what type of gun Gutierrez possessed, they were consistent that Gutierrez was the only person who possessed a weapon. Moreover, Gutierrez sprayed bullets into the crowd despite the fact that they were all running away from him, including Gordon. Montanez was on the ground, defenseless, when he was shot at. There is no evidence supporting an instruction that Gutierrez acted out of fear of being killed or suffering great bodily harm. Only

speculative evidence supported the instruction and was not sufficient to warrant instructing the jury.

Even if we were to conclude that the court erred in failing to instruct on the sudden quarrel/heat of passion or imperfect self-defense theories of attempted voluntary manslaughter, such error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. In a noncapital case, such as this one, error in failing to instruct on all lesser included offenses and theories which are supported by the evidence "must be reviewed for prejudice exclusively under *Watson*. A conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' [citation], it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred [citation]." (*People v. Breverman* (1998) 19 Cal.4th 142, 178, fn. omitted.)

We will discuss defendants' guilt of premeditated, deliberate, and willful attempted murder in more detail, *post*, but briefly there was strong evidence that the defendants here were guilty of the greater offense. Gutierrez armed himself with a gun, and Manzano knew about it. They arrived at the Jack in the Box restaurant, and Manzano told Gutierrez that Gordon had jumped him. They both agreed, as Gutierrez loaded his gun, that they were going to do work for the gang. Manzano drove Gutierrez to Gordon. Gordon got out, yelled "Diablos," and shot numerous times in several directions, hitting Montanez and Aultman. They celebrated after the shooting that they had got "them." The evidence of willful, premeditated, and deliberate attempted murder of all three

victims was strong. As such, the failure to instruct the jury on attempted voluntary manslaughter was clearly harmless.

IV

INSTRUCTIONS ON AIDING AND ABETTING UNDER A THEORY OF NATURAL AND PROBABLE CONSEQUENCES

Manzano complains that the trial court erred by failing to properly instruct the jury that in order to find him guilty of aiding and abetting the attempted premeditated and deliberate murder of Aultman and Manzano, they had to find that attempted premeditated and deliberate murder was the natural and probable consequence of the attempted murder and assault with a deadly weapon on Gordon. The parties in their briefs cited conflicting appellate court authority on the issue. Manzano relied on *People v. Hart* (2009) 176 Cal.App.4th 662 (*Hart*), and the People relied upon *People v. Cummins* (2005) 127 Cal.App.4th 667 (*Cummins*). However, since the parties filed their briefs, the California Supreme Court has resolved the issue in *People v. Favor* (2012) 54 Cal.4th 868, finding, "[T]he jury need not be instructed that a premeditated attempt to murder must have been a natural and probable consequence of the target offense." (*Id*. at p. 872.)

A. *Additional Factual Background*

In a preliminary discussion of the instructions with all of the parties, the trial court noted it was not planning to instruct on natural and probable consequences (CALCRIM No. 402) for Manzano because aiding and abetting covered the situation in this case. The prosecutor withdrew the request for CALCRIM No. 402. The prosecutor thought it was easier for the jury to consider that Manzano was guilty strictly under a theory of aiding

and abetting the three attempted murders on the victims, rather than having them find that attempted premeditated and deliberate murder of Aultman and Montanez was the natural and probable consequences of attempted murder or assault with a deadly weapon on Gordon.

The Manzano jury was instructed on aiding and abetting. It was instructed, "A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator. Under some circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime." It was also instructed, "Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose, and he or she specifically intends to and does in fact aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." The jury was then given the definition of attempted murder and the special allegation of premeditation and deliberation (CALCRIM No. 601) as follows: "If you find the defendant guilty of attempted murder under Count 1, 2, or 3, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with premeditation and deliberation. [¶] The defendant acted willfully if he intended to kill when he acted. The defendant deliberated if he carefully weighed the considerations for and against his choice and, knowing the consequences[,] decided to kill. [¶] The defendant premeditated if he decided to kill before acting. . . . " The jury was instructed that, if they did not find that this was attempted murder, they could find assault with a deadly weapon.

During closing argument in front of Manzano's jury, the prosecutor stated that Manzano aided and abetted the premeditated and deliberate attempted murders on Gordon, Aultman, and Montanez.

After deliberations began, the jury asked two questions. The first question was, "If someone is not shot can they still have murder attempted on them[?]" Next, they asked "If person #1 aids person #2 in a shooting but may not have wanted anyone to be murdered. If someone is seriously shot, does person #1 share the same responsibility?"

The prosecutor requested that the natural and probable consequences instruction be given to the jury and that he be allowed to reopen argument. Manzano's counsel disagreed with giving the instruction, insisting that the question was actually whether an aider and abettor shares the same intent as the perpetrator. Manzano's counsel objected to the instruction on the grounds that it did not properly answer the jury's question and also cited to *Hart*.

After further discussion, the trial court instructed the jury as follows: "The defendant is charged in Count 1 with attempted murder of Rashad Gordon and in Counts 2 and 3 with attempted murder of Daniel Montanez and Jacques Aultman. The defendant is charged in Count 4 with assault with a firearm on Rashad Gordon, and in Counts 5 and 6 with assault with a firearm on Daniel Montanez and Jacques Aultman.

"You must first decide whether the defendant is guilty of attempted murder of Rashad Gordon or assault with a firearm on Rashad Gordon. If you find the defendant is guilty of this crime, you must then decide whether he is guilty of attempted murder of

Daniel Montanez and/or Jacques Aultman or assault with a firearm on Daniel Montanez and/or Jacques Aultman.

"Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.

"To prove that the defendant is guilty of attempted murder of Daniel Montanez and/or Jacques Aultman or assault with a firearm on Daniel Montanez and/or Jacques Aultman, the People must prove that:

"No. 1, the defendant is guilty of attempted murder of Rashad Gordon or assault with a firearm on Rashad Gordon:

"No. 2, during the commission of the attempted murder of Rashad Gordon or assault with a firearm on Rashad Gordon, a coparticipant in the attempted murder of Rashad Gordon or assault with a firearm on Rashad Gordon committed the crime of attempted murder of Daniel Montanez and/or Jacques Aultman or assault with a firearm on Daniel Montanez and/or Jacques Aultman;

"And No. 3, under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the attempted murder of Daniel Montanez and/or Jacques Aultman or the commission of assault with a firearm on Daniel Montanez and/or Jacques Aultman was a natural and probable consequence of the commission of the attempted murder of Rashad Gordon or assault with a firearm on Rashad Gordon.

"A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

"A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

"If the attempted murder of Daniel Montanez and/or Jacques Aultman or assault with a firearm on Daniel Montanez and/or Jacques Aultman was committed for a reason independent of the common plan to commit the attempted murder of Rashad Gordon or assault with a firearm on Rashad Gordon, then the commission of attempted murder of Daniel Montanez and/or Jacques Aultman and the assault with a firearm on Daniel Montanez and/or Jacques Aultman was not a natural and probable consequence of the attempted murder of Rashad Gordon or assault with a firearm on Rashad Gordon.

"To decide whether the crime of attempted murder of Daniel Montanez and/or Jacques Aultman or the crime of assault with a firearm on Daniel Montanez and/or Jacques Aultman was committed, please refer to the separate instructions that I have given you on that crime.

"Further, if you find that attempt murder of Daniel Montanez and/or Jacques Aultman was a natural and probable consequence of the attempt murder of Rashad Gordon, then you must decide whether the attempt murder of Daniel Montanez and/or Jacques Aultman was willful, deliberate, and premeditated."

B. *Analysis*

"[U]nder the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' [Citation.] . . . [I]f a person

aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault." (*People v. McCoy, supra,* 25 Cal.4th at p. 1117.) A charged crime is a natural and probable consequence of a target crime if it was reasonably foreseeable that the charged crime would be committed. "The . . . question is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133, italics omitted.) Here, the jury was instructed on both attempted murder and assault with a deadly weapon of Gordon as the target offenses. They were never instructed that they had to find that premeditated, deliberate, and willful attempted murder was the natural and probable consequence of these target offenses, only that attempted murder was a natural and probable consequence.

In *Cummins, supra,* 127 Cal.App.4th 667, Cummins and a cohort carjacked the victim's vehicle, robbed him, and took him to a location where one of them pushed him off a cliff, but it was not determined who pushed him. Cummins's cohort was convicted of premeditated attempted murder under the natural and probable consequences doctrine. (*Id*. at pp. 671-672, 677.) He argued on appeal that the trial court erroneously "failed to inform the jury it had to find that a *premeditated* attempted murder had to be a natural and probable consequence of the robbery or carjacking." (*Id.* at p. 680.) The court disagreed, finding that he was a willing participant leading up to the victim being pushed off the cliff. The appellate court concluded, "The jury here was properly instructed on the elements of attempted premeditated murder and, based on the evidence, found the

attempt on [the victim's] life was willful, deliberate, and premeditated. Nothing more was required." (*Id*. at pp. 680-681.)

In *Hart, supra,* 176 Cal.App.4th 662, Hart's codefendant was convicted of premeditated attempted murder when defendant shot the owner of the food and liquor store they were robbing. (*Id*. at pp. 666-668.) According to the instructions, the jury was told it could find the codefendant guilty of attempted murder if it found that it was a natural and probable consequence of the attempted robbery. (*Id*. at pp. 669-670.) The codefendant challenged the instructions, and the reviewing court held that the instructions failed to inform the jury that in order to find the accomplice "guilty of attempted premeditated murder as a natural and probable consequence of attempted robbery, it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery." (*Id*. at p. 673.)

In *People v. Favor, supra,* 54 Cal.4th 868, the California Supreme Court addressed the split in authority between *Hart* and *Cummins* and found that *Cummins* was the better-reasoned case. It concluded, "Because section 664[, subdivision](a) 'requires only that the attempted murder itself was willful, deliberate, and premeditated' [citation], it is only necessary that the attempted murder 'be committed by one of the perpetrators with the requisite state of mind.' [Citation.] Moreover, the jury does not decide the truth of the penalty premeditation allegation until it first has reached a verdict on the substantive offense of attempted murder. [Citation.] Thus, with respect to the natural and probable consequences doctrine as applied to the premeditation allegation under section 664[, subdivision](a), attempted murder -- not attempted premeditated

murder -- qualifies as the nontarget *offense* to which the jury must find forseeability. Accordingly, once the jury finds that an aider and abettor, in general or under the natural and probable consequences doctrine, has committed an attempted murder, it separately determines whether the attempted murder was willful, deliberate, and premeditated. [¶] Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation." (*Favor*, at pp. 879-880.)

We follow the reasoning in *Favor* and *Cummins*. The instructions given here were sufficient as they instructed the jury that if they found the attempted murders of Aultman and Montanez were forseeable consequences of the target offenses of attempted murder or assault with a deadly weapon on Gordon, they then must decide if the attempted murders were willful, deliberate, and premeditated. The jury was properly instructed.

V

INSUFFICIENT EVIDENCE

Manzano contends that the evidence was insufficient to support his conviction of the premeditated, deliberate, and willful attempted murders of Aultman and Montanez,

because there was no evidence to support that Gutierrez committed premeditated and deliberate murder as required by section 664, subdivision (a).[11]

"Our task is clear. 'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]" [Citation.]' [Citations.] The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' [Citation.]" (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.)

Section 664, subdivision (a) provides that if the crime that is attempted is willful, premeditated, and deliberate, the person guilty of the attempt shall be punished by

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[11] Manzano's jury was not instructed on the kill zone theory, as will be discussed *post*, and therefore, Manzano's jury had to find that Gutierrez intended to commit the attempted premeditated, deliberate, and willful murders of Aultman, Montanez, and Gordon.

imprisonment in the state prison for life with the possibility of parole. Section 664, subdivision (a) "does *not* require that an attempted murderer personally act with willfulness, deliberation, and premeditation. It requires only that the attempted murder itself was willful, deliberate and premeditated." (*People v. Lee, supra,* 31 Cal.4th at p. 626.) "Punishment [in section 664, subdivision (a)] takes account not only of the criminal's mental state, but also of his or her conduct, the consequences of such conduct and the surrounding circumstances. [Citations.] Such circumstances may include the fact that the murder attempted was willful, deliberate, and premeditated." (*Id.* at p. 627.) As such, "section 664[, subdivision](a) properly must be interpreted to require only that the murder attempted was willful, deliberate, and premeditated, but not to require that an attempted murderer personally acted with willfulness, deliberation, and premeditation, even if he or she is guilty as an aider and abettor." (*Ibid.*) In the circumstances involving the aider and abettor liability under a natural and probable consequences theory, only one of the perpetrators must have committed the murder with the requisite state of mind. (*People v. Favor, supra,* 54 Cal.4th at p. 879.)

In *People v. Anderson* (1968) 70 Cal.2d 15, 25-26, the California Supreme Court set forth a framework for courts to utilize in assessing whether the evidence is sufficient to support premeditation, deliberation, and willfulness. Our Supreme Court identified three categories of evidence relevant to determining premeditation and deliberation: planning activity, motive, and manner of killing. (*Id.* at pp. 26-27; *People v. Streeter* (2012) 54 Cal.4th 205, 242.) "'However, these factors are not exclusive, nor are they invariably determinative.' [Citation.]" (*Streeter*, at p. 242.) The factors merely guide

the reviewing court in assessing whether the evidence supports "'"an inference that the killing occurred as the result of preexisting reflection rather than an unconsidered or rash impulse."'" (*Ibid*.)

There was ample evidence presented in this case that the attempted murder of Montanez and Aultman was willful, premeditated, and deliberate. Both Manzano and Gutierrez were Diablos gang members. Gutierrez armed himself with a gun and Manzano knew he had the gun. They arrived at the Jack in the Box restaurant and Manzano immediately pointed out that Gordon had previously beat him up. Thereafter, they both agreed that they would do work for the gang, which Detective Valdivia testified meant committing violent acts to increase the gang's reputation in the community. The fact that this was a calculated gang attack on individuals in the crowd was further evidenced by Gutierrez yelling "Diablos" prior to shooting and that the bullets were fired in numerous directions. Gutierrez and Manzano rejoiced after the shooting that they got "them." Detective Valdivia testified that the crimes were committed for the benefit of the gang, a clear motive in this case to commit the crimes, and the jury obviously found this true by finding both Gutierrez and Manzano guilty of the gang enhancements. There was substantial evidence that Gutierrez possessed the requisite intent to commit the attempted murders of Aultman and Montanez, and these attempted murders were committed willfully and with premeditation and deliberation. As such, the jury's finding that Manzano was guilty of the attempted first degree murders of Aultman and Montanez was supported by the evidence.

VI

KILL ZONE THEORY

Gutierrez contends that the evidence was insufficient to support his conviction of the attempted murder of Aultman based on a kill zone theory of liability because he did not intend to kill everyone in the crowd but rather targeted only Gordon and Montanez.

A. *Additional Factual Background*

The prosecutor withdrew his request for the kill zone language in CALCRIM No. 600. He argued in closing to the Gutierrez jury that Gutierrez loaded the gun in the car and then stepped out of the car to commit the shooting. Gutierrez's intent was to murder these people to send a message to the community and the crowd that he was Sparks from the Diablos. Gutierrez intended to kill Montanez because he shot right at him while he was on the ground. Gutierrez was pointing his gun at members of the crowd trying to kill them, including Aultman. He showed his intent to kill everyone in the crowd by saying that "we got them" when he got back in the car.

Gutierrez's counsel responded that Gutierrez was not at the shooting. Further, the shootings in the legs showed no intent to kill by the shooter.

After the jury started deliberating, they asked the following question: "Legal clarification of CALCRIM 600 Attempted Murder #2." The jury was called into the courtroom to clarify their question. The jurors asked, "[D]oes it have to be that you intended on that person or just the act of what you did?" They also questioned whether, if the shooter did not know the person he shot but "just pointed the gun and the bullet

went off and hit the person, just because you don't know them, does that have an intent to kill?"

The trial court noted outside the presence of the jury that transferred intent does not apply to attempted murder. It also noted that the use note for the transferred intent instruction stated that defendants may be convicted of attempted murders under a kill zone theory based on concurrent intent. The prosecutor was now thinking that a kill zone instruction was necessary. Defendant's counsel stated, " . . . I don't see I could have an objection to that kill zone instruction being read at this point under all the circumstances that are already on the record." Defendant's counsel asked to reargue the issue.

The trial court reread the entire attempted murder instruction and added the following language: "A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Daniel Montanez and/or Jacquez Aultman, the People must prove that the defendant not only intended to kill Rashad Gordon but also intended to kill Daniel Montanez and/or Jacquez Aultman or intended to kill everyone within the kill zone. [¶] If you have a reasonable doubt whether the defendant intended to kill Daniel Montanez and/or Jacquez Aultman or intended to kill Rashad Gordon by killing everyone else in the kill zone, then you must find the defendant not guilty of the attempted murder of Daniel Montanez and/or Jacquez Aultman."

The prosecutor argued that this situation was analogous to a person placing a bomb on a bus, in that even if the perpetrator had the intent to kill one person on the bus, the method used to kill that person would necessarily kill others. The prosecutor stated,

"But by getting out of the car and choosing to just fire that gun, a hail of bullets, based on that conduct, you can infer that he had concurrent intent to kill, not only [Gordon] but everyone in the parking lot at the Jack in the Box."

In response, Gutierrez's counsel argued that indifference or not caring whether or not you kill somebody is not a specific intent to kill. Shooting a gun into the crowd does not necessarily show an intent to kill. The jury still had to find that Gutierrez intended to kill Aultman and Montanez.

B. *Analysis*

As previously stated, "[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee*, *supra*, 31 Cal.4th at p. 623.) In *People v. Bland* (2002) 28 Cal.4th 313, a case involving a gang member shooting into a car containing several occupants with a .38-caliber handgun, the Supreme Court held that, although the doctrine of transferred intent does not apply to attempted murder, a defendant who performs an act such as shooting at a group of people that includes his primary target may be found to have concurrently intended to kill his primary target and everyone else within the "kill zone." (*Id*. at pp. 318, 329-330, 333.)

The kill zone theory provides "that a shooter may be convicted of multiple counts of attempted murder . . . where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter

intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm. [Citation.]" (*People v. Smith, supra,* 37 Cal.4th at pp. 745-746.)

In *People v. Perez* (2010) 50 Cal.4th 222, the defendant shot at a group of police officers with no particular target; he shot only one time. (*Id*. at p 224.) The California Supreme Court granted review on the question of "whether sufficient evidence supports defendant's convictions of eight counts of premeditated attempted murder based on his firing of a single shot at the group . . . ." (*Id*. at p. 229.) It concluded that the evidence supported only one count of attempted murder. (*Id*. at p. 234.)

The Supreme Court analyzed whether a kill zone had been created in which, even though there was only one shot, the defendant could be convicted of the attempted murder of all those in the kill zone. It held, "*Bland's* kill zone theory of multiple attempted murder is necessarily defined by the nature and scope of the attack. The firing of a single bullet under these circumstances is not the equivalent of using an explosive device with intent to kill everyone in the area of the blast, or spraying a crowd with automatic weapon fire, a means likewise calculated to kill everyone fired upon. The indiscriminate firing of a single shot at a group of persons, without more, does not amount to an attempted murder of everyone in the group. The holding in *Bland* is not controlling on these facts." (*People v. Perez, supra*, 50 Cal.4th at p. 232.) However, the instant case is more akin to *Bland.*

Here, Gutierrez stepped out of his car and approached Gordon. Gordon was surrounded by numerous people. Gutierrez claims there were only two to three shots fired and that he targeted Montanez. However, Gordon stated that he heard at least eight

shots. Aultman heard four or five shots. Aultman was running behind Gordon. Duncan heard at least 12 shots. Bullet holes were found in different cars and on the drive-through menu.

The evidence here supported the kill zone theory. Gutierrez indiscriminately sprayed bullets into the crowd and shot at Gordon and those around him, intending to kill them. It was not necessary that he use a bomb or a machine gun to be convicted under the kill zone theory. The jury could properly find Gutierrez guilty of the attempted premeditated and deliberate murder of Aultman under a kill zone theory.

VII

MANZANO'S SENTENCING PURSUANT TO

PENAL CODE SECTION 12022.53, SUBDIVISION (e)(1)

Manzano contends that his sentence under 12022.53, subdivision (e)[12] is unauthorized because the jury did not make the required findings that a principal discharged a firearm as required by that section. The People concede the error.

Section 12022.53 provides for additional sentence enhancements if a gun is used in the commission of an offense. Subdivision (e)(1) provides for derivative liability and states, "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." Subdivision (b)

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[12] All references to section 12022.53 are to versions prior to the repeal effective January 1, 2012.

provides, "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a) [including murder and attempted murder], personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. . . . " Subdivision (c) provides, "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years." Subdivision (d) provides, "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 26100, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

Manzano's jury was never asked to decide whether a firearm was discharged in this case. The jury verdict forms stated for counts 1, 2, and 3 as follows: "We, the jury in the above-entitled action, find the defendant . . . , in the commission and attempted commission of the offense[s] charged under count[s] [1, 2 & 3] of the indictment, did act as a principal for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in any criminal conduct by gang members, within the meaning of Penal Code section 12022.53, subdivision (e)." After the jury reached its verdict, the trial court noted that the jury had never been asked to reach the issue of whether a firearm was discharged. The jury was never instructed

that section 12022.53, subdivision (e)(1) was a gun enhancement and was likely confused as to how this differed from the gang enhancement under section 186.22, subdivision (b). The prosecutor did not seek any further finding by the jury because the enhancement was improperly pled.

Inexplicably, at the time of sentencing, the inadequacy was not discussed. Manzano was sentenced to the sentence of seven years to life on count 1 and a 20-year determinate sentence under section 12022.53, subdivision (e)(1). Defendant received the same sentence on counts 2 and 3, but they were ordered to run concurrent with the sentence on count 1. Clearly, it was erroneous to sentence Manzano on the section 12022.53, subdivision (e)(1) enhancements, and we strike Manzano's sentence on those enhancements.

As noted by Manzano, he was also found guilty of the gang enhancements under section 186.22, subdivision (b) for all counts. Since he cannot be sentenced under section 12022.53, subdivision (e)(1), he can be sentenced under section 186.22. (See § 12022.53, subd. (e)(2).) Therefore, remand is appropriate in order for the trial court to properly impose the gang enhancements and exercise its discretion as to the appropriate punishment for the gang enhancements.

VIII

DISPOSITION

The sentences imposed on Manzano for the section 12022.53, subdivision (e)(1) enhancements are stricken, and the matter is remanded to the trial court for resentencing

in accordance with part VII, *ante*. In all other respects, the judgments as to both defendants are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.